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Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., *et al.*,
Petitioners,

v.

CHARLES O. FINLEY & COMPANY, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. The brief in opposition highlights what it attempts to obscure: no court below ever applied the rule of reason; no court below ever looked at the actual effect of the challenged conduct on competition; and no court below ever examined whether Finley suffered antitrust injury, or to what degree. Instead, the courts below applied *Tampa Electric* mechanically rather than conceptually, starting from the unsupported premise that Sportservice's 24% market share made its contracts a "substantial foreclosure" of competition.[1]

[1] As the petitioners have consistently maintained, the 24% market share figure is itself totally artificial. Pet. at 4 n.4. The volume criteria which define this universe of concession opportunities ignore the demand consideration that facility owners within the universe can and do look to concessionaires

(footnote continues)

Notwithstanding respondents' effort to weave a complicated story of decades of intrigue and evil motives, the facts here are actually quite simple. In 1950, the owners of the Athletics had the rights to two businesses—the sale of baseball tickets and the sale of concession items. They needed money. They sold the concession business to gain the money to keep the franchise afloat.[2] As the initial district court noted, longer terms are almost invariably linked to loans or advances as consideration.[3] 365 F. Supp. at 251; App. E at 120a. There is no indication that any baseball owner under contract to Sportservice entered the original contract for any other reason than that Sportservice offered a more attractive package; nor is there any indication that Sportservice or other baseball concessionaires were able to preclude other concessionaires from bidding. Although respondents now are willing to second-guess the owners who preferred upfront money to increased percentage

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(*footnote continued*)

outside it for services and that concessionaires do not order their activities by those volume boundaries at all; larger concessionaires can and do do business with a broader range of facilities and concessionaires at smaller facilities can and do offer their services to larger facilities, as illustrated by Finley's experience in Oakland. Sportservice's market share in a broader, more rational market may be lower than two percent (PX801) and in any event would clearly be insignificant.

[2] The initial district court opinion was venomous on the subject of the "loans" and "payoffs" which paid for that business (and which kept the Athletics in business). 365 F. Supp. at 250; App. E at 118a. It cited as evidence for its suspicions of Sportservice's conduct the fact that other concessionaires would not offer the Athletics the cash the team needed in 1950 and that, without it, the Athletics might have folded entirely. 365 F. Supp. at 252-53; App. E at 121a-22a. In other words, the sale of the concession business resulted from a real need for the money, not from some manipulation by petitioners. Moreover, if the premise is true and the Athletics would have folded without that money, it is fatuous to maintain (as the respondents nevertheless do) that the payments have been fully amortized and that Finley retains no consequent benefit. Without those payments, *ceteris paribus*, there would have been no Athletics for Finley to buy.

[3] Similar arrangements are commonplace in connection with real estate and franchise transactions. Pet. at 8-9; *cf.* Richards, *National Accepts Shubert Pact: Gets Interest-Free $1 Million Loan In Return for 20-Year Contract*, Washington Post, Oct. 29, 1982, at B1, col. 6 (as consideration for 20-year lease, agreement to give interest-free $1 million loan repayable out of profits over 10 years, pay $100,00 per year, and split profits evenly).

revenues spread over a longer time, Br. in Opp. at 11-12, there was nothing irrational or anticompetitive in the preference at the time, nor does the passage of time change its character. Nor is there any way for Sportservice to turn these supposedly "predatory" payments at the beginning of the concession into extraordinary profits later.[4]

Later, the Athletics sold the baseball business; the new owner did not buy the concession business, which had already been sold, and the price paid for the baseball business inevitably reflected this earlier sale. Respondents now argue that Finley was "ensnared" by these "deceptive" prior sales contracts. But importantly, there is no suggestion that Finley got less than it paid for, nor is there any suggestion that the original sale to Finley was procured by fraud.[5] In any event, even if Finley could legitimately make such an argument, it would

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[4] All of the cases upon which respondents rely focus on the anticompetitive effect of enforced exclusivity; but here exclusivity in itself is not an issue, since both parties concede that the concession contract is necessarily exclusive. *Compare* the cases cited in the Brief in Opposition at fns. 12 and 18. The issue thus is not the competitive difference between exclusive and non-exclusive concession contracts, but the anticompetitive effect (if any) of an extended contract which must always be exclusive no matter who holds it. By ignoring the difference between concession contracts where length and not exclusivity is the issue, the opinion below obscured a central issue: is there any way in which the length of Sportservice's contract gives it the power to raise price or restrict output in future transactions? In the normal exclusive dealing situation, there is some conceivable danger that exclusive contracts can raise the costs of distribution or supply for competitors so that some power over price or ability to exclude competitors is achieved. Here there is no such possibility. At each facility, the existing concessionaire faces the same short-term demand whether the franchise is for two years or twenty. The bidding for the next available concession should reflect the money the concessionaire might realize from those rights, and a bidder certainly derives no advantage related to the length of concessions it might hold elsewhere.

[5] The respondents' attempt to portray Finley as a party caught between the Athletics contract with Sportservice and the Oakland Coliseum's contract with Sportservice's successor, Br. in Opp. at 3, is disingenuous and misleading. Charles Finley was the one who gave instructions to break the Sportservice contract (PX 136); Finley also protected itself in its arrangements with Sportservice's successor by providing that the successor would give up its rights if Finley were found to be bound to Sportservice. (Tr. 483-84).

certainly provide no grounds for relief against Sportservice, which was not a party to the Finley purchase. Finley is in the same position as one who buys a building which is already under long term lease: he is bound whether the deal was made in a buyers' or a sellers' market. The Athletics' owners who sold concession franchises to Sportservice were free to take or leave Sportservice's offer. If Finley wanted to recover the concession rights previously sold, he could have offered to buy them back or he could have refused to buy the baseball business without them. Instead, he accepted the contract, and later chose breach and litigation in an effort to be relieved of its obligations.

Finally, it cannot be rationally argued that this franchise has any impact at all on competition for other franchises. When other owners of concession rights make future offers to sell their concession businesses, Sportservice and other concessionaires are equally free to bid. There is no suggestion that there will be fewer bidders or less attractive terms as a result of Sportservice's other holdings. In bidding for other franchises, neither length, nor number of concessions, nor follow-the-franchise clauses, can affect Sportservice as a competitor or the seller's ability to decide on the most attractive offer on the merits. The effect on current or prospective competition which this Court has identified as the central concern of the antitrust laws, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 320; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, is totally absent.

2. If, as this analysis indicates, Sportservice's conduct was not a restraint of trade, then the attempt to monopolize claim must fail as well. The respondents distort the reasoning of the court of appeals when they argue that the finding of intent to monopolize can stand on its own. The court of appeals' inferences of specific intent to monopolize and dangerous probability of success were based upon the same "anticompetitive" characterizations of Sportservice's conduct which supported the findings under Section 1; if that conduct was not "the basis for a substantial claim of restraint of trade," there is no basis for those inferences and no basis for the attempted

monopolization claim. 676 F.2d at 1308-09; App. A at 26a-27a.[6]

3. Finley does not dispute that Sportservice in fact paid substantial sums (in the form of loans and advances, in addition to a percentage of sales) for the Athletics' concession franchise. Instead, Finley argues that Sportservice never paid *Finley*, and thus those payments are irrelevant to a calculation of *Finley's* damages. But Finley never owned the Athletics' concession rights; it bought the Athletics subject to Sportservice's existing contract, and its payment for the Athletics inevitably reflected that fact. When Finley moved the Athletics to Oakland (presumably for economic reasons), it no doubt occurred to Finley that it could make more money by breaking the existing contract and selling the concession rights that it had never paid for. The result is this litigation.

What the courts below have done is to ratify Finley's economic reasoning: if you can sell rights you didn't have to pay for, you will undoubtedly make more money than you could by not selling those rights. Petitioner does not doubt Finley's arithmetic, but surely this cannot be the kind of "injury" the antitrust laws were designed to remedy[7], *see Brunswick*, 429

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[6] It is somewhat surprising that the respondents are able to discern a harmonious evolution of attempt to monopolize standards in the decisions of the Ninth and those of other circuits. The overwhelming perception of disinterested commentators and enterprising plaintiffs seems to be to the contrary. *See* Pet. at 11 n.19; III P. Areeda & D. Turner, *Antitrust Law* ¶ 832 (1978); J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] nn. 30-33 (1982); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373, 385, 419-20 (1974). Respondents stress the point that market factors and shares are not irrelevant in the Ninth Circuit, but they cannot gloss over the fact that the Ninth Circuit permits intent and dangerous probability of success to be inferred from conduct alone, and that the showing below would not support an attempt finding elsewhere.

[7] Respondents' assertion that injury and damage issues were not raised below is simply not accurate. In fact, this point has been argued strenuously since the initial district court opinion. *See, e.g.*, Post-Trial Memorandum of Plaintiff Twin City Sportservice, Inc., and Counterdefendants Twin City Sportservice, Inc., and Sportservice Corporation, and Memorandum in Sup-

(*footnote continues*)

U.S. at 489. The result below can only be justified by ignoring the actual benefits received by Finley's predecessors in interest and equating the economic interests of one party to a bargain with the public interest in competition. Neither premise is acceptable under the decisions of this Court.

(footnote continued)

port of Plaintiff's and Counterdefendants' Proposed Findings of Fact and Conclusions of Law at iii, 3, 73-74, 78-81; Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of the Plaintiff and Counterdefendants Twin City Sportservice, Inc. and Sportservice Corporation at 18-21, both in the district court below (1972).

CONCLUSION

For all the reasons discussed here and in the initial petition, petition for certiorari should be granted.

Respectfully submitted,

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